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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 871

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION No. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REDWING CARRIERS, INC., and ROCKANA CARRIERS, INC.,

Intervenors.

PETITIONER'S REPLY TO RESPONDENT'S AND INTERVENORS' BRIEFS IN OPPOSITION

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REILLY PUBLISHING COMPANY — 1710 S. HARWOOD — DALLAS, TEXAS — HA 8-8585

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Petitioner presents the following reply to the Briefs in Opposition, as authorized by Rule 24(4).

1.

THE NLRB OPPOSITION

A.

The Board errs when it asserts (Brief, p. 6) that "there is no conflict of decision: . . ."

The Board's uniform decisions until *Auto Parts*, 107 NLRB 242 (1952) were that discharge for refusal to cross a picket line was unlawful as a deprivation of the "protected" right to engage in "concerted activity" for "mutual aid and protection." See for example, *Re Columbia Pictures Corp.*, 82 NLRB 568 (1949); *Re New York Tel. Co.*, 89 NLRB 383 (1950); *Re Cinch Mfg. Co.*, 91 NLRB 371 (1950); *Re de Cordova*, 91 NLRB 1121 (1950); *Re West Coast Casket Co.*, 97 NLRB 820, (1951); cf. *NLRB v. Montag Bros.*, 140 F. 2d 730 (CA 5, 1944).

The Board's consistent holding in those cases was summarized by the Board itself in its *West Coast Casket* decision, 97 NLRB 820 at 823:

> "this Board has consistently accorded the protection of Section 7 of the Act to employees who, by refusing to cross picket lines or by other lawful means have lent sympathy or support to striking employees. For us to hold otherwise would be to hold that although Congress protected the fundamental right of labor organizations to engage in primary picketing, it withheld this protection from the normal employee response which makes that right effective."[2]

For no apparent reason, other than change in composition of the Board, there followed *Auto Parts*, 107 NLRB 242; and the instant case on initial hearing, 130 NLRB 1208, holding the refusal to cross a picket line "not protected."

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[1] *Contra NLRB v. Illinois Bell Tel. Co.*, 189 F. 2d 124 (CA 7, 1951).

[2] Compare the Annotation at 51 ALR 2d 519ff. (1953): *"Discharge of employee who refused to cross picket line as unfair labor practice."*

On second hearing the Board issued the decision here under review, 137 NLRB 1545, wherein it departed from both lines of cases and embarked on a third, wherein the employer's motivation is held determinative.

B.

The Board, by this new departure applies to this §§7 and 8(a)(1) case the §8(a)(3) test of "discrimination" wherein "the employer's motive is decisive. . ."[3]

But employer's motive is not relevant in a §§7 and 8(a)(1) case. This was the square holding in *Garment Workers v. NLRB*, 366 U.S. 731 at 739 (1961), citing *"NLRB v. Perfect Circle Co.* (CA 7), 162 F. 2d 566; *NLRB v. Illinois Tool Works* (CA 7), 153 F. 2d 811;[4] *McQuay Norris Mfg. Co. v. NLRB* (CA 7), 116 F. 2d 748; and cf. *NLRB v. Industrial Cotton Mills* (CA 4), 208 F. 2d 87, 45 ALR 2d 880."

The vice of the Board's determination solely on

[3] See Solicitor General Cox's "Some Aspects of the Labor Management Relations Act, 1947," 61 Harv. L. R. 48 at 67ff. (1947):

"The reason the employer's motive is decisive is plain. Imposed legal duties are usually a compromise between conflicting interests, the aggressor being privileged to invade the victim's interest to protect his own, so far as the law recognizes it. Hence, when the aggressor is not actuated by a desire to protect a recognized interest, the basis for his excuse disappears. This philosophy is embedded in Section 8(3). If an employer discharges an employee to protect his interst in building up an efficient working force, he does not commit an unfair labor practice, even though the discharged employee is a union leader and organization is thereby set back. On the other hand, if the employer's action springs from a desire to discourage organization, the privilege is lost and the discharge is unlawful."

[4] In *Illinois Tool* the Court held, 153 F. 2d 811 at 814:

". . . the test of interference, restraint and coercion under §8(1) of the Act does not turn on the employer's motive. . . The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. . . (citing cases)."

the basis of "employer's motive" (Board's brief in opposition, pp. 6-9) was noted in another context by the Third Circuit in *Cusano v. NLRB*, 190 F. 2d 898 at 902:

> "To adopt petitioner's [employer's] view would materially weaken the guarantees of the Act, for the extent of employee's protected rights would be made to vary with the state of the employer's mind."

As the Board's brief admits (p.7) under the test which the Board applies ". . . an unfair labor practice when motivated by anti-union considerations may be privileged when taken for normal business reasons". (Opposition, p. 7).

The trouble is that such a view when applied to §§7 and 8(a)(1) "materially weaken[s] the guarantees of the Act, for the extent of employees' protected rights [is] made to vary with the state of the employer's mind."

The anomalous result is that truckdriver "A" who is employed by a viciously anti-union employer may enjoy and be protected in his "protected" right to refuse to cross a picket line. But driver "B" who works for a pro-union employer finds that his "protected" right to honor the picket line will not be protected. Query how "A" or "B" is to fathom his employer's mind when he approaches the picket line?

C.

The instant decision holds, according to the Board's later *Everist* decision "that a discharge

for refusal to cross a picket line is an exception to the general rule that employees may not be discharged for engaging in protected concerted activity." Such discharge is "not a discharge for cause, but merely a permissible act in furtherance of the employer's overriding right to keep his business going *by replacing such employees.*" *In re Everist*, 142 NLRB No. 20, Slip Opinion p. 4. (Emphasis added)

Had the Board actually followed, in this *Red Wing* case, the rationale which *Everist* says was here followed it could not have reached this result. For Redwing's supervisor in charge of the drivers,[6] Pierola, Joint App. p. 88ff., did *not* discharge and replace them. He admitted: "I had to *transfer* men from the other run to this one," Joint App. 102. Pierola further testified, Joint App. p. 102-103:

> "Q. Did they ever refuse to do any other work that day?
>
> A. No sir they didn't refuse any other work

[5] *Everist* goes on to equate complainants [illegible] replaced by an employer to permit continued [illegible] not permanently replaced, are entitled to reinstatement upon unconditional application.

[illegible] This is the very rationale which the Board *refused* to follow in *Red Wing*. For in the instant case the Board held, Supp. App. p. 11, Appendix to Petition for Certiorari, pp. 501-512:

"In considering the continued validity of the discharge-replacement distinction in this situation, we are convinced that substance, rather than form, should be controlling. That is, where it is clear from the record that the employer acted only to preserve efficient operation of his business, and terminated the services of the employees only so it could immediately or within a short period thereafter replace them with others willing to perform the scheduled work, we can see no reason for reaching different results solely on the basis of the precise words, i.e., replacement or discharge, used by the employer, or the chronological order in which the employer terminated and replaced the employees in question."

[6] Mendez, Redwing's president, admitted that Pierola "handled" the "going in and getting the drivers in there." Supp. App. p. 35.

except they wouldn't cross the VC picket line.

TRIAL EXAMINER: Was there any reason why they were not capable of doing the other work?

THE WITNESS: No sir they were capable of doing the other work but as I said sir they were permanently assigned to this.

TRIAL EXAMINER: But was there some reason why these seven men couldn't do the work that these men were doing before you took them off?

THE WITNESS: No sir. Of course I had to pull these other fellows that were in no way connected with pulling these runs to come in and do so.

TRIAL EXAMINER: But these men could have done the work of the men that you pulled off of this other run couldn't they?

* * * *

THE WITNESS: Yes sir they could have done the work."

No thought was given to transferring complainants to the "runs" from which others were transferred.

Contrary to the Board's statement that it is only following *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347, its ruling in fact constitutes an unwarranted ex-

tension of the *Mackay* case. An employer who is doing business with a picketed employer has the option of transferring those employees who are willing to go through the picket line to perform the work necessary for him to continue this business, and of using his objecting employees to perform other work. The employer whose employees have gone out on strike obviously has no such option since his striking employees are refusing to perform any work at all. Hence, only in those situations where the employer has too few non-objecting employees to perform the work necessary for him to continue doing business with the picketed employer does *MacKay* justify the discharge of the objecting employees rather than transferring them to other work. This was *not* the situation in the instant case.

Had the Board not been so centered on the "employer motivation" test, it would doubtless have noted the facts, which it ignored, that employer made no effort to transfer the work to non-objecting drivers. And had it done so, it could have balanced the employees' claim to the "protected right" to honor a picket line against the employer's "right to run his business," not on the irrelevant criteria of employer's motive, but on the basis of the actual business necessity for intrusion upon the employees' rights.

Had it done so it would have noted that of the more than fifty drivers in the fleet only a handful insisted on their Section 7 rights; and that employer could easily have vindicated his "right to run his business" by the use of non-objecting

drivers. The suggestion at Redwing's Opposition, pages 12-13, that this would have resulted in "administrative difficulties" cannot be sustained by evidence in the record. In any event, the Board, enamored of its "motivation" test, did not consider this claim. Finally, even had the point been considered, and had the evidence sustained it, as a matter of law employees' §7 "protected" rights should be preferred as against the "administrative difficulties" which an employer may experience in guaranteeing these "protected" rights.

D.

Finally, the Board's narrow view of the extent to which protection of employees "protected" rights to honor a picket line should be vindicated fails to take account of the whole statute. This court at its last decision day emphasized the protected nature of "traditional primary activity of appealing to neutral employees whose tasks aid the employer's every day operations," *Steelworkers v. NLRB*, __ U.S. __, 55 LRRM 2698 at 2701 (March 23, 1964). And noted that "Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at those approaching the situs whose mission is. . . delivering. . . . Congress intended to preserve the right to picket. . . [aimed at] neutral deliverymen furnishing day-to-day service essential to the employer's regular operation." To say that those who observe the picket may not exercise the "protected right" to be persuaded by his message is to circumscribe the right to picket itself. The

right of communication is no less important to the auditor than to the speaker.

2.

THE REDWING (INTERVENORS') OPPOSITION

A.

What we have said above likewise meets the employer's opposition. We note, in addition, only that employer misrepresents our position in asserting "that Section 7 rights are absolute." We do not so contend. We do say that the Section 7 "protected" right is worthy of protection *vis-a-vis* the "administrative difficulties" in which employer predicts he would be involved (Redwing Opposition, pp. 12-13). And we say that any balancing of conflicting rights should not depend on the vagaries of a particular employer's "motivation", but on an analysis on the one hand of the factual context (here violence) which made it in the essential self-interest of the drivers to avoid the picket line. On the other hand a proper balancing of interest required inquiry and findings, which the Board eschews, with respect to the specific "administrative difficulties" facing the employer, the feasibility of transfer of duty to non-objecting employees; or other means of the employer's accommodating temporarily to permit the exercise of employee rights. We shall develop further in brief on the merits suggestions as to criteria which the Board could properly apply to assure maximum vindication of the rights of employees to engage in "protected" §7 activities; of employers "to run

their business," and of the public in an effective transport industry. Here it is enough to say that the Board may not avoid the analysis and policy judgments required in such accommodation by making the employer's "motivation" determinative of the employees' rights.

B.

Finally, we note that neither the Board nor Intervenor challenge our assertion as to the importance of this question. Both seek denial of certiorari on the sole ground that the important question has been decided correctly below. We believe we have demonstrated that it was decided incorrectly. And certainly almost thirty years after the enactment of §§7 and 8(a)(1) the employer, the truck driver, and the customer are entitled to authoritative determination here by which answer may come to the daily recurring question: "Must I go through that lawful picket line?"

WHEREFORE, petitioner prays that certiorari be granted.

Respectfully,

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April 3, 1964.

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